

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KENNETH FLEMING, JOHN DOE, R.K., and  
T.D.,

Plaintiffs,

v.

THE CORPORATION OF THE PRESIDENT  
OF THE CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a Utah corporation  
sole, a/d/a "MORMON CHURCH"; LDS  
SOCIAL SERVICES a/d/a LDS, a Utah  
corporation,

Defendants.

NO. 04-2338 RSM

SPECIAL VERDICT FORM  
PROPOSED BY DEFENDANT  
(REVISED)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Did Plaintiff Robert Kelly commence this action within the period of  
time required by law?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

(INSTRUCTION: If you answered Question 1 "yes", go to question 2. If you answered  
Question 1 "no," sign this verdict form).

SPECIAL VERDICT FORM PROPOSED BY DEFENDANT  
(REVISED) - 1  
No. 04-2338 RSM

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Phone (206) 467-6477  
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QUESTION 2: Were any of the following negligent?

(Answer "yes" or "no" after the name of the defendant and the name of each entity not party to this action.)

ANSWER:

	Yes	No
Defendant Church		
Non-Party Dr. Herman Allenbach		
Non-Party Dorothy Kelly		
Non-Party Jerry Kelly		

(INSTRUCTION: If you answered Question 2 "no" as to the defendant, sign this verdict form. If you answered Question 2 "yes" as to the defendant, go to Question 3.)

QUESTION 3: Was such negligence a proximate cause of injury to the plaintiff?

(Answer "yes" or "no" after the name of the defendant and each non-party, if any, to which you answered "yes" in Question 2.)

ANSWER:

	Yes	No
Defendant Church		
Non-Party Dr. Herman Allenbach		
Non-Party Dorothy Kelly		
Non-Party Jerry Kelly		

(INSTRUCTION: If you answered Question 3 "no" as to the defendant, sign this verdict form. If you answered Question 3 "yes" as to the defendant, go to Question 4.)

QUESTION 4: Did Mr. Loholt's abuse of plaintiff occur prior to February 1972?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

1 QUESTION 5: Was Dr. Herman Allenbach an agent of defendant acting within the  
 2 scope of his authority with respect to his acts or omissions regarding Mr. Loholt?  
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5 ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_  
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7 (INSTRUCTION: If you answered Question 5 "yes", go to Question 6. If you  
 8 answered Question 5 "no", go to Question 7.)  
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15 QUESTION 6: Assume that 100% represents the total combined negligence that  
 16 proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the  
 17 defendant and what percentage of this 100% is attributable to each non-party, if any, whose fault  
 18 was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff?  
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23 Your total must equal 100%.  
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25 ANSWER:  
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To Defendant Church	_____ %
To Non-Party Dorothy Kelly	_____ %
To Non-Party Jerry Kelly	_____ %
<b>TOTAL</b>	<b>100%</b>

31 (INSTRUCTION: Skip Question 7 and go to Question 8).  
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QUESTION 7: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the defendant and what percentage of this 100% is attributable to each non-party, if any, whose fault was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

To Defendant Church	_____ %
To Non-Party Dr. Herman Allenbach	_____ %
To Non-Party Dorothy Kelly	_____ %
To Non-Party Jerry Kelly	_____ %
<b>TOTAL</b>	<b>100%</b>

QUESTION 8: What do you find to be the plaintiff's amount of damages?

ANSWER: \$ \_\_\_\_\_

QUESTION 9: What percentage of the damages in your answer to Question No. 8 do you find were caused by negligent conduct and what percentage were caused by Mr. Loholt's intentional conduct? (Your total must add up to 100%)

ANSWER:

Negligent	_____ %
Intentional	_____ %
<b>Total</b>	<b>100%</b>

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

DATE: \_\_\_\_\_

\_\_\_\_\_  
Presiding Juror

**Defendant's Authority:** Defendant's proposed special verdict form adapts the pattern verdict form in WPI 45.21 to the facts of this case. Two added questions, 4 and 5, merit some explanation. If the Court does not grant Defendant's directed verdict motion that Dr. Allenbach is *not* an agent as a matter of law, Question 5 is necessary because the Court and the parties must know whether the jury finds him to be an agent. The outcome of the answer to Question 5 determines which question the jury must then answer, questions that contain a different list of entities to whom the jury can assign a percentage of fault. *Cf.*, Questions 6 and 7. If Dr. Allenbach is an agent, then he is no different than any other agent of COP and the jury could not assign him a percentage of fault separate from that of the Church (see Question 6). That is, in event of his agency, the Church would be legally responsible for his negligence and to assign him fault separately would be "double counting." On the other hand, if he is not an agent, he is a person to whom the jury can assign fault (see Question 7).

Question 4 is included for reasons of judicial efficiency. Having this answer may eliminate a trial in the event of an appeal and reversal. For example, if the jury finds in favor of plaintiff based solely on agency of Dr. Allenbach, and the Ninth Circuit later rules that Dr. Allenbach was not an agent as a matter of law, then there would be no fact issue to retry if the jury has found that the abuse preceded February 1972. If the abuse preceded notice to COP regarding Mr. Loholt, COP would not have owed plaintiff a duty.

As to Plaintiff's proposed verdict form, it is objectionable for numerous reasons. First, it deviates significantly from the relevant pattern verdict form, WPI 45.21, without justification. Second, the form of the questions is improper. Instead of asking the relevant question, "was defendant negligent," it contains a series of questions that repetitively pose the negligence issue in argumentative terms. Third, Question 5 introduces an issue—failure to train—on which there

1 will be no testimony in this case. Plaintiff has no liability expert with regard to the standard of  
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3 care, circa 1972, regarding training of clergy on matters of sexual abuse. Fourth, Question 7 asks  
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5 whether the parties had a special relationship which gave rise to a duty; this is a question of law,  
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7 not fact. Fifth, plaintiff omits Dr. Herman Allenbach as a non-party who can be found negligent.  
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9 Plaintiff is free to argue Dr. Allenbach was an agent, but if the jury disagrees he needs to be  
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11 listed as a non-party at fault. Sixth, as set forth in WPI 45.21, the negligence (or not) of  
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13 defendant and the non-parties is determined in the same question. Seventh, Question 13 is  
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15 improper for the reasons discussed in COP's objections to Plaintiff's proposed instruction  
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17 number 3 on burden of proof. If the jury were to find defendant negligent, this question would  
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19 necessarily have been answered "yes," and the instruction's imposition of a burden of proof on  
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21 defendant is inconsistent with *Tegman* and this Court's ruling on the *Tegman* motion.  
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